Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

Lawrence S. Krain,

Petitioner,

v.

ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, Nikki M. Zollar, Acting Director, Illinois Department of Professional Regulation,

Respondents.

Petition for Writ of Certiorari to Review Judgment of the Appellate Court of Illinois, First District

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appellate Court of Illinois, First District, erred in holding, contrary to the rulings of this Court, that a medical license which enables its holder to pursue his occupation is, therefore, a protected property right which can be denied without due process.

2. Whether the Appellate Court of Illinois, First District, erred in its construction of the Administrative Review Law (contrary to the precedent of this Court), finding that a holder of a protected property right is not entitled to a forum and a meaningful opportunity to be heard upon newly discovered evidence.

PARTIES

PARTIES TO THE PROCEEDINGS IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS AND IN THE APPELLATE COURT OF ILLINOIS

The only parties in this matter, both in the Circuit Court of Cook County, Illinois and in the Appellate Court of Illinois were:

Plaintiff:	Lawrence S. Krain, M.D.,
Defendants:	Department Of Professional Regulation State Of Illinois, Nikki M. Zollar, Director

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Contents iii

Table Of Authorities v

Citations Tc Opinions Below 1

Statement Of Jurisdiction 1

Constitutional and Statutory Provisions 3

Statement Of the Case 3

Reasons For Allowance Of The Writ 14

Argument 17

I. MEDICAL LICENSE IS A PROTECTED PROPERTY RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND, THUS, DR. KRAIN MUST BE AFFORDED NOTICE AND OPPORTUNITY TO BE HEARD BEFORE HE MAY BE DEPRIVED OF IT. 17

II. **THE APPELLATE COURT'S INTERPRETATION OF THE ADMINISTRATIVE REVIEW LAW DEPRIVES DR. KRAIN OF DUE PROCESS OF LAW BECAUSE ACCORDING TO THAT INTERPRETATION HE HAS NO FORUM AND, THEREFORE, NO OPPORTUNITY TO BE HEARD WITH RESPECT TO HIS CLAIM OF NEWLY DISCOVERED EVIDENCE.** 20

III. **AN OPPORTUNITY TO BE HEARD IN ADMINISTRATIVE PROCEEDINGS DID NOT CONSTITUTE A MEANINGFUL OPPORTUNITY BECAUSE, THROUGH NO FAULT OF HIS OWN, DR. KRAIN WAS NOT ABLE TO PRESENT COMPELLING EVIDENCE DISPROVING THE DEPARTMENT'S CLAIM THAT HE SUFFERS FROM A MENTAL ILLNESS OR DISABILITY WHICH PREVENTS HIM FROM SAFELY PRACTICING MEDICINE BECAUSE THAT EVIDENCE WAS NOT AVAILABLE UNTIL AFTER THE ORIGINAL HEARING.** 23

CONCLUSION 26

APPENDIX

August 8, 1997 Opinion of the
Appellate Court of Illinois,
First District . . . . . App. 1

September 8, 1993 Order of the Circuit Court of Cook County, Illinois . . . . . App. 8

January 5, 1996 Order of the Appellate Court of Illinois, First District . . . . . App. 19

March 6, 1998 Decision of the Appellate Court of Illinois, First District . . . . . App. 29

April 10, 1998 Modified Order of the Appellate Court of Illinois, First District . . . . . App. 39

March 16, 1998 Order of the Supreme Court of Illinois . . . . . App. 49

Report of Procedings of July 19, 1996, before Judge Ellis Reid . . . . . App. 50

Constitutional and Statutory Provisions

U.S. Const. Amend. V . . . . . App. 10

U.S. Const. Amend. XIV . . . . . App. 11

735 ILCS 5/3-102 . . . . . App. 12

735 ILCS 5/3-103 . . . . . App. 14

735 ILCS 5/3-111(a)(7) . . . . . App. 15

735 ILCS 5/2-1401 . . . . . App. 16

TABLE OF AUTHORITIES

CASES **Page**

Balmoral Racing Club, Inc. v. Illinois Racing Board, 151 Ill.2d 367, 405-406, 603 N.E.2d (1992) 18

Barry v. Barchi, 443 U.S. 55, 74, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) 22, 25

Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed. 90 (1971) 19

DeGrand v. Motors Insurance Corporation, 146 Ill.2d 521, 588 N.E.2d 1074, 1077 (1992) 15

Giglio v. United States, 405 U.S. 150, 152-155, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) 22

Krain v. Dept. of Professional Regulation, 291 Ill. App.3d 988, 684 N.E.2d 826 (1st Dist. 1997) 23-24

Mathews v. Eldridge, 424 U.S. 319, 333-334, 96 S.Ct. 893, 902, 47 L.Ed. 18 (1976) 21, 25

Mayer v. Chicago, 404 U.S. 189, 194-196, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) 18

M.L.B. v. S.L.J, __ U.S.__, 117 S.Ct. 555, 559-570, 136 L.Ed.2d 473 (1996) 18

Niven v. Siqueira, 109 Ill.2d 357, 487 N.E.2d 937, 942 (1985) 15

Porter v. Investors Syndicate, 286 U.S. 461, 470-472, 52 S.Ct. 617, 76 L.Ed. 1226 (1932) 25

Schware v. Board of Bd. Examiners, 353 U.S. 232 , 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) 19

Weaver v. Palmer Bros. Co., 270 U.S. 402, 415, 46 S.Ct. 320, 70 L.Ed. 654 (1926) 22

Willner v. Committee on Character & Fitness, 373 U.S. 96, 102 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) 18

OTHER AUTHORITIES

U.S. Const. Amend. V . . . . . App. 10

U.S. Const. Amend. XIV . . . . . App. 11

735 ILCS 5/3-102 . . . . . App. 12

735 ILCS 5/3-103 . . . . . App. 14

735 ILCS 5/3-111(a)(7) . . . . . App. 15

735 ILCS 5/2-1401 . . . . . App. 16

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lawrence S. Krain (hereinafter "petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, entered in this cause on August 8, 1997.

CITATIONS TO OPINIONS BELOW

The decision of the Appellate Court of Illinois, First District (hereinafter the "Appellate Court") is reported at 291 Ill. App.3d 988, 684 N.E.2d 826 (1st Dist. 1997), and is reprinted in full in the appendix hereto at App. 1.

The order of the Circuit Court of Cook County (hereinafter the "Circuit Court") is reprinted in full in the appendix hereto at App. 8.

STATEMENT OF JURISDICTION

The Order of the Illinois Supreme Court denying discretionary review in this case was entered on February 4,

1998, and pursuant to 28 U.S. C. 2101 (c) and United States Supreme Court Rule 13.1, the present petition is timely and appropriate for consideration by this Court.

In his Petition for Rehearing before the Illinois Appellate Court and his Petition For Leave To Appeal and Motion For Reconsideration Of Denial Of Extension For Leave To Appeal before the Illinois Supreme Court, petitioner argued that the Appellate Court's interpretation of the Illinois Administrative Review Law, 735 ILCS 5/3-101 et seq., violated his due process rights by denying him any forum in which to present his claims of newly discovered evidence and, therefore, any opportunity to be heard in violation of his federal constitutional rights to due process. The Illinois Supreme Court, however, denied discretionary review.

Accordingly, the jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Citations to the constitutional provisions and statutes involved in this case are set forth below. Because the text of the cited constitutional and statutory provisions is lengthy, the pertinent text is set forth in the appendix to this petition:

U. S. Const. Amend. V . . . . . App. 10

U. S. Const. Amend.XIV.§ 1 . . . . . App. 11

735 ILCS 5/3-102 . . . . . App. 12

735 ILCS 5/3-103 . . . . . App. 14

735 ILCS 5/3-111(a)(7) . . . . . App. 15

735 ILCS 5/2-1401 . . . . . App. 16

STATEMENT OF THE CASE

The Underlying Administrative Proceedings and Direct Administrative Review

On March 22, 1993, the Director of the Department (the "Director") ordered petitioner's medical license indefinitely suspended for a minimum period of one year.

This order represented the administrative disposition of the Department's complaint against petitioner. (Appeal No. 93-4559/96-2879). The only pertinent finding which formed the basis of petitioner's suspension is the administrative finding that petitioner "suffers from a mental illness or disability which results in the inability to practice with reasonable skill and safety." As a result of this, petitioner has been indefinitely suspended from the practice of medicine unless and until the Department concludes that he has satisfactorily fulfilled certain requirements mandated by the Department.

The finding that petitioner was suffering from a mental illness or disability rested primarily upon the testimony of the Department's psychiatrist, Dr. S. Dale Loomis, and the Department's psychologist, Roger Thomson, Ph.D. (Appeal No. 93-4559/96-2879).

A group of eight other psychiatrists and psychologists also saw and evaluated petitioner during the period of time

prior to the administrative hearings. Contrary to the opinions of Drs. Loomis and Thomson, each and every one of these eight experts found petitioner fit to practice medicine.

On April 5, 1993, petitioner filed his Complaint in the Circuit Court, seeking administrative review of the Department's suspension order. On administrative review, the Circuit Court reversed the Director's suspension order. The Circuit Court found that the Director's determination that petitioner suffered from a mental illness or disability was against the manifest weight of the evidence. (Appeal No. 93-4559/96-2879).

The Department appealed the Circuit Court's ruling and, on January 5, 1996, the Appellate Court issued an unpublished Rule 23 order ("Order") reversing the Circuit Court's decision. *Krain v. Dept. of Professional Regulation*, No. 93-4559, filed January 5, 1996; (A copy of that Order is included in Appendix 19). The Appellate Court found that

there was adequate evidence to support the Department's conclusion that petitioner suffers from a mental illness or disability which resulted in his inability to practice medicine. (See App. 27). The Appellate Court cited as additional support for its holding the fact that petitioner had filed a counterclaim against Sentry Life Insurance Company, alleging breach of contract by failing to pay petitioner disability benefits. (See App. 26). But the Department failed to disclose and the Appellate Court was unaware of the dismissal of the Sentry action prior to the issuance of its decision.

The Newly Discovered Evidence And Petitioner's Attempts To Find A Forum In Which To Present The Newly Discovered Evidence

On July 2, 1996, petitioner filed a Complaint requesting that the Circuit Court remand the matter to the Department for consideration of newly discovered evidence and that the Circuit Court enjoin or stay the Department's

order suspending petitioner's medical license pending the Department's consideration of the evidence on remand.

With his Complaint, petitioner sought consideration of certain critical evidence that had been discovered subsequent to the administrative proceedings before the Department. The newly discovered evidence that subsequently emerged consists of important medical facts relating to petitioner's condition during the time period of the administrative proceedings. Additionally, there exists the new evidence that petitioner's counterclaim against Sentry Life Insurance Company, which the Appellate Court relied upon in upholding the Department's discipline order, resulted in a dismissal with a finding that petitioner had not been disabled.

With respect to the newly discovered medical evidence, petitioner's Complaint alleged that, at the time petitioner was examined by the Department-appointed doctors, Drs. Loomis and Thomson, petitioner was taking a

combination of the drugs Prozac and Halcion. Petitioner took this prescribed regimen under the care of Dr. Sheldon Schiff. It was not until sometime after the death of Dr. Schiff in 1993 and the termination of the administrative proceedings that petitioner, in reviewing his insurance records, discovered that Dr. Schiff had been prescribing the combined regimen of Prozac and Halcion during this period of time. (Appeal No. 93-4559/96-2879).

Neither Dr. Loomis nor Dr. Thomson were aware of the fact that petitioner was under the influence of this prescribed regimen of Prozac and Halcion at the time they examined petitioner and testified to the results of their examinations at the hearing before the Department. (Appeal No. 93-4559/96-2879). In fact, the destructive effects of such a drug combination were not generally known in the medical community until 1994 and 1995.

Nor were Drs. Loomis and Thomson aware of

additional newly discovered medical evidence at the time they examined petitioner which established that petitioner had been suffering from the symptoms of tic douloureux dating back to 1989. It was not until 1995, that petitioner was effectively cured of tic douloureux when he underwent a long neurosurgical operation. Because petitioner was not even diagnosed with this disease until after the administrative proceedings against him terminated, this evidence could not have been discovered prior to the issuance of the disciplinary order and would not have been cumulative of any evidence adduced at the proceedings.

In addition to the above-described newly discovered evidence, petitioner's Complaint alleged that he was currently able to safely practice medicine. This assertion was supported by the affidavits of three psychiatrists who had recently examined petitioner and who had all concluded that there is no medical reason why petitioner cannot safely

practice medicine at this time.

On July 9, 1996, petitioner also filed a petition ("Petition") pursuant to 735 ILCS 5/2-1401 of the Illinois Code of Civil Procedure seeking relief from the adverse judgment entered pursuant to the Appellate Court's mandate in the appeal from the Circuit Court's decision in the direct administrative review proceedings. On July 17, 1996, upon being advised of the Petition pending before Judge Foreman, Judge Reid continued the proceedings before him to July 19, 1996.

Upon initial presentation of petitioner's Petition, which included a stay request on July 18, 1996, Judge Foreman ruled that he lacked jurisdiction over the Petition and dismissed it with prejudice. Petitioner appealed from that decision. *Krain v. Dept. of Professional Regulation*, (Appeal No. 96-2879).

On March 6, 1998, the Illinois Appellate Court issued

its decision affirming the trial Court's decision that Judge Foreman lacked jurisdiction over Dr. Krain's Petition pursuant to Section 2-1401 of the Illinois Code of Civil Procedure. (A copy of that decision is included in Appendix 29).

On March 27, 1998, petitioner filed his Petition For Rehearing in connection with Appeal No. 96-2879. On April 10, 1998, the Illinois Appellate Court issued its Modified Order Upon Denial Of Rehearing. (A copy of that Order is included in Appendix 39).

On July 19, 1996, after Judge Foreman had ruled that he lacked jurisdiction to consider petitioner's Petition, Judge Reid found that he could exercise jurisdiction and entered an order remanding the matter to the Department for consideration of the newly discovered evidence. Judge Reid also stayed the effect of the Department's underlying order of discipline, pending the Department's consideration of the

newly discovered evidence. (See App. 70-71).

The Department appealed both aspects of Judge Reid's order, taking separate appeals from the remandment to the Department and the stay of the effect of the Department's underlying order of discipline pending the Department's consideration of the newly discovered evidence. The Department's appeals were consolidated. On appeal, as discussed supra, the Appellate Court found that the Circuit Court lacked subject matter jurisdiction. (Appeal Nos. 96-2527, 96-2874).

On October 30, 1997, petitioner filed a Petition For Leave To Appeal with the Illinois Supreme Court, in a matter styled, *Krain v. Dept. of Professional Regulation*, Supreme Court No. 84337. The Petition For Leave To Appeal sought review of the Illinois Appellate Court's decision in the consolidated appeal styled, *Krain v. Dept. of Professional Regulation*. Appeal Nos. 96-2527, 96-2874.

On February 25, 1998, petitioner filed with the Illinois Supreme Court his Motion For Leave To File Instanter Motion For Reconsideration Of Denial Of Petition For Leave To Appeal, indicating in its order that its mandate had issued forthwith to the Illinois Appellate Court.

On March 10, 1998, Dr. Krain filed with the Illinois Supreme Court his Motion To Recall Mandate, asking the Illinois Supreme Court to recall its mandate issued on March 9, 1998, pending the filing and a ruling upon a petition for writ of certiorari by petitioner to this Court. By order dated March 16, 1998, the Illinois Supreme Court granted petitioner's motion and ordered its mandate recalled and stayed pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court. (A true and correct copy of the Illinois Supreme Court's Order is included in Appendix 49).

REASONS FOR ALLOWANCE OF THE WRIT

This case presents significant issues relating to the correct construction of the Illinois Administrative Review Act and the protection it affords litigants aggrieved by erroneous administrative decisions.

The Appellate Court's decision essentially eliminates a party's ability, in connection with an administrative review proceeding, to obtain consideration of newly discovered evidence. In the context of administrative proceedings, the Appellate Court's finding that the Circuit Court lacked jurisdiction in this case effectively eliminates access to any forum in which a party may present a claim of newly discovered evidence, resulting in a manifest deprivation of due process.

Pursuant to the Appellate Court's decision, if newly discovered evidence arises after the Circuit Court loses its initial jurisdiction over an underlying administrative review

action, then a litigant is simply out of luck. The Appellate Court reached this decision notwithstanding the plain language of the Act, which expressly provides the Circuit Court with that power. 735 ILCS 5/3-111(a)(7). The Appellate Court erroneously decided that Section 3-103 of the Act (735 ILCS 5/3-103), rather than Section 3-111, controls the jurisdictional inquiry.

In incorrectly interpreting Section 3-103 and Section 3-111 of the Act, the Appellate Court ignored well-established principles of statutory construction, as set forth in the decisions of the Illinois Supreme Court, other decisions of the First District Appellate Court and the other Districts of the Appellate Court. (E.g., *DeGrand v. Motors Insurance Corporation, 146 Ill.2d 521, 588 N.E.2d 1074, 1077 (1992); Niven v. Siqueira, 109 Ill.2d 357, 487 N.E.2d 937, 942 (1985))*. The Appellate Court's interpretation of Section 3-111(a)(7) contravenes the express language of that provision

and the clear intent of the legislature as expressed in that language. With Section 3-111(a)(7), the General Assembly sought to afford litigants aggrieved by administrative determinations a procedural vehicle analogous to Section 2-1401 of the Code.

Further, the Appellate Court's construction requires a litigant's due process rights to turn on nothing more than the fortuity of timing. If petitioner had been able to discover and present his newly discovered evidence within 35 days of the Department's suspension order or during the pendency of the direct administrative review proceeding, petitioner would have been afforded an opportunity to be heard. However, because the newly discovered evidence did not arise until later, petitioner is deprived of any forum in which he can even present his claim that his newly discovered evidence should be considered by the Department and, consequently, deprived of due process of law.

Finally, the Appellate Court's determination that the Circuit Court did not have jurisdiction over petitioner's Complaint overlooks the fact that the Circuit Court properly exercised jurisdiction as part of its general chancery jurisdiction.

ARGUMENT

I. A MEDICAL LICENSE IS A PROTECTED PROPERTY RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THUS, DR. KRAIN MUST BE AFFORDED NOTICE AND OPPORTUNITY TO BE HEARD BEFORE HE MAY BE DEPRIVED OF IT.

The Appellate Court's finding that the Circuit Court lacked jurisdiction in this case effectively eliminates access to any forum in which petitioner may present his claim of newly discovered evidence. This interpretation results in a deprivation of his due process rights under the Fifth and the Fourteenth Amendments. U. S. Const., Amend. V and XIV, § 1.

There is no doubt that petitioner's medical license is a protected property right under the Due Process Clause and thus he must be afforded notice and an opportunity to be heard. *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill.2d 367, 405-406, 603 N.E.2d 489 (1992), wherein the Court found that a racing license enables its holder to pursue his occupation and is, therefore, a protected property right which cannot be denied without due process. This court's decision in *Mayer v. Chicago*, 404 U.S. 189, 194-196, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), and *M.L.B. v. S.L.J*, __ U.S.__, 117 S.Ct. 555, 559-570, 136 L.Ed.2d 473 (1996) stands for the principle that equal and open access to the state courts should not be impeded by unreasoned distinctions affecting appellate avenues of review.

Similarly, in *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S. Ct. 1175, 1180, 10 L.Ed.2d 224 (1963), the court concluded that a State cannot exclude

a person from the practice of law or other occupations in a manner that contravenes due process. See also, *Schware v. Board of Bar Examiners*; 353 U.S. 232, 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).

In *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed. 90 (1971), this Court reiterated that:

> [O]nce licenses are issued...., their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses...involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

In this case suspension of the petitioner's medical license, not only irreparably damages his livelihood but, most importantly, it constitutes unwarranted and unlawful deprivation of petitioner's protected property rights and, therefore, it demands the notice and opportunity to be heard as guaranteed

II. THE APPELLATE COURT'S INTERPRETATION OF THE ADMINISTRATIVE REVIEW ACT DEPRIVES DR. KRAIN OF DUE PROCESS OF LAW BECAUSE ACCORDING TO THAT INTERPRETATION HE HAS NO FORUM AND, THEREFORE, NO OPPORTUNITY TO BE HEARD WITH RESPECT TO HIS CLAIM OF NEWLY DISCOVERED EVIDENCE.

The Appellate Court's decision in this case denies petitioner, and all similarly situated litigants who, like petitioner, are victims of an erroneous administrative decision, the fundamental constitutional right to a forum in which they may even be heard.

In this case, the Appellate Court ruled that Judge Reid lacked subject matter jurisdiction over petitioner's Complaint In Administrative Review For Injunctive Relief And Remandment Based On Newly Discovered Evidence, and therefore lacked the power to remand this case for consideration of the newly discovered evidence to the Department for its consideration. Based on this decision, the Appellate Court vacated Judge Reid's Decision remanding

this cause to the Department, staying its previously ordered discipline relative to petitioner's medical license pending consideration by the Department. According to these decisions, there is no forum in which petitioner can even present a claim before the Department of certain newly discovered evidence which calls into serious question the correctness of the Department's underlying order of discipline.

The lack of any procedural mechanism by which petitioner can rectify an erroneous administrative determination that deprived him of his property rights denies him an opportunity to be heard under circumstances which require that he be afforded such an opportunity. See, *Mathews v. Eldridge*, 424 U.S. 319, 333-334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), wherein this Court held that due process is flexible and calls for such procedural protection as the particular situation demands, with the fundamental

requirement of having the opportunity to be heard at a meaningful time and in a meaningful manner. See also, *Barry v. Barchi*, 443 U.S. 55, 66, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415, 46 S.Ct. 320, 70 L.Ed. 654 (1926), reiterating constitutional guarantees may not be made to yield to mere convenience.

In *Giglio v. United States*, 405 U.S. 150, 152-155, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the petitioner in a forgery conviction filed a motion on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness that it would not be prosecuted if he testified for the Government. This Court held that the nondisclosure of this evidence affecting the co-conspirator's credibility violated due process and thus required a new trial.

In this case, according to the Appellate Court's

decision, petitioner is not entitled to a forum in which he can present his claim of newly discovered evidence simply because it did not conveniently arise during the initial 35 days following the decision to the administrative agency or during the pendency of the direct administrative review proceedings before the Circuit Court. This interpretation amounts to a deprivation of property rights in violation of due process.

III. AN OPPORTUNITY TO BE HEARD IN ADMINISTRATIVE PROCEEDINGS DID NOT CONSTITUTE A MEANINGFUL OPPORTUNITY BECAUSE, THROUGH NO FAULT OF HIS OWN, DR. KRAIN WAS NOT ABLE TO PRESENT COMPELLING EVIDENCE DISPROVING THE DEPARTMENT'S CLAIM THAT HE SUFFERS FROM A MENTAL ILLNESS OR DISABILITY WHICH PREVENTS HIM FROM SAFELY PRACTICING MEDICINE. THAT EVIDENCE WAS NOT AVAILABLE UNTIL AFTER THE ORIGINAL HEARING.

The Appellate Court's finding that the Circuit Court lacked jurisdiction over petitioner's Section 2-1401 petition, combined with its prior decision in *Krain v. Dept. of*

Professional Regulation, 291 Ill.App.3d 988, 684 N.E.2d 826 (1st Dist. 1997), prohibits a party from access to any forum in which to present a claim of newly discovered evidence or other information because it constitutes a nullity of a final decision by an administrative agency. Thus, these rulings result in a manifest deprivation of petitioner's due process rights, in contravention of the United States Constitution. U.S. Const., Amend. XIV, § 1.

In this case, the Court affirmed Judge Foreman's dismissal of petitioner's Section 2-1401 petition, by which petitioner sought a remandment to the Department for consideration of certain newly discovered evidence, approving Judge Foreman's finding that he lacked subject matter jurisdiction. In *Krain, supra*, this Court concluded that Judge Reid lacked subject matter jurisdiction over petitioner's Complaint In Administrative Review For Injunctive Relief And Remandment Based On Newly

Discovered Evidence, and, therefore, lacked the power to remand this cause for consideration of the newly discovered evidence to the Department for its consideration. According to the Court's decision in this case and its decision in *Krain, supra*, there is no forum in which petitioner can present a claim of newly discovered evidence before the Department. This amounts to a deprivation of his property rights without due process and denies him a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333-334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976).

In *Barry v. Barchi*, 443 U.S. 55, 74, 99 S.Ct. 2642, 61 L.Ed.2d (1979), in construing the phrase "meaningful", the court concluded:

> [To] be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided.

Similarly in *Porter v. Investors Syndicate*, 286 U.S. 461, 470-472, 52 S.Ct. 617, 76 L.Ed. 1226 (1932), this Court held that state statutes or decisions of the state court that prohibit granting a stay (which was part of the relief requested in both Illinois *Krain* actions before Judges Foreman and Reid), deny due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

App. 1

684 N.E.2d 826

LAWRENCE S. KRAIN, M.D.

Plaintiff-Appellee,

v.

DEPARTMENT OF PROFESSIONAL REGULATION, STATE OF ILLINOIS; and NIKKI M. ZOLLAR, Director, Illinois Department of Professional Regulation,

Defendant-Appellants.

Nos. 1-96-2527, 1-96-2874

Appellate Court Of Illinois
First District, Sixth Division

Aug. 8, 1997

Rehearing denied Sept. 25, 1997

Justice ZWICK delivered the opinion of the court:

Appellants, Department of Professional Regulation and Nikki M. Zollar, its Director, appeal from an order entered by the circuit court which stayed the Department's suspension of plaintiff's medical license. Appellants simultaneously filed a second appeal challenging the circuit

court's order remanding the matter to the Department for consideration of the "new evidence." We have jurisdiction in the number 1-96-2527 pursuant to Supreme Court Rule 307(a)(1)(134 Ill.2d R.307(a)(1)). Jurisdiction in number 1-96-2874 is pursuant to Supreme Court Rule 306(a)(6)(134 Ill.2d R. 306(a)(6)). We have consolidated these appeals for purposes of our disposition.

This is not the first time this matter has been before the appellate court. On January 5, 1996, in an unpublished order (No. 1-93-4559), we reviewed an order of the circuit court which reversed the Department's March 22, 1993 suspension of plaintiff's medical license. In that order we noted, contrary to the findings of the circuit court, that the Department had relied upon substantial evidence in concluding plaintiff's medical license should be suspended for a minimum of 1 year. We therefore reversed the circuit court and affirmed the Department's determination that

petition suffered from mental illness or disability which resulted in his inability to practice medicine with reasonable skill and safety. See 225 ILCS 60/21(A)(3),(A)(27)(West 1994).

Six months after our decision reversing the circuit court and affirming the Department, plaintiff filed this second action for administrative review in the circuit court. Plaintiff cited the discovery of certain "new evidence" which he claimed warranted new proceedings. One week later, on July 19, 1996, the circuit court entered the now-challenged order staying plaintiff's license suspension and remanding the matter to the Department to reconsider the matter. We stayed the circuit court's orders pending resolution of these appeals.

We find that the circuit court lacked jurisdiction to consider petitioner's second administrative review complaint. Section 3-103 of the Administrative Review Law is clear. It

requires that an administrative review action be commenced within 35 days of the decision from which review is sought. 735 ILCS 5/3-103 (West 1994); *Lockett v. Chicago Police Board*, 133 Ill.2d 349, 354-55, 140 Ill.Dec, 394, 549 N.E.2d 1266 (1990). Plaintiff's second complaint seeking administrative review was filed more than 3 years after the final administrative decision he sought to challenge had been rendered. This was long after the circuit court's "final disposition" of the case, when the circuit court lost its jurisdiction over the plaintiff's initial complaint. See 735 ILCS 5/3-104 (West 1994). Accordingly, the orders of the circuit court saying the proceedings and remanding the case to the Department are void. *Swope v. Northern Illinois Gas Co.*, 2231 Ill.App.3d 241, 243, 163 Ill.Dec. 665, 581 N.E.2d 819 (1991).

Plaintiff raises the novel argument that, pursuant to the provisions of section 3-111(a)(7) of the Administrative

Review law, the circuit court has the power to remand a case to an administrative agency for the limited purpose of taking additional evidence, even after the circuit court has lost jurisdiction over the matter. Section 3-111 provides in pertinent part:

> "(a) The Circuit Court has power:
>
> * * * * * * *
>
> "(7) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just." 735 ILCS 5/3-111(a)(7)(West 1996).

We disagree with plaintiff's expansive reading of section 3-111(a)(7).

When the circuit court considers a matter on administrative review, it sits as a court of review, giving deference to the findings of fact made by the agency from which the appeal is taken. See 735 ILCS 5/3-110 (West 1994). Like other Illinois courts of review, the circuit court

must have the power to remand the case *during the proceedings* if it determines that remand is required by the record presented to it. Section 3-111(a)(7) merely codifies this rule of appellate procedure, in much the same way as Supreme Court Rule 366(a)(5) codifies the law of remandment for our appellate and supreme courts. Cf. 134 Ill.2d R. 366(a)(5)("the reviewing court may * * * grant any relief, including remandment, * * * that the case may require").

Allowing the circuit court to order remand during the course of the proceedings is far different, however, from allowing the court to re-exert its jurisdiction after final disposition. To allow litigants to re-invoke the circuit court's jurisdiction simplify by alleging the existence of newly discovered evidence in the circuit court, long after an administrative proceeding has been concluded, would fatally undermine the finality of administrative decisions and would

directly contravene the jurisdictional language of sections 3-103 and 3-104.

Because the circuit court lacked jurisdiction to consider the plaintiff's second administrative review action, the orders of the circuit court are void and are hereby vacated.

GREIMAN, P.J. and QUINN, J., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

No. 93 CH 03166

LAWRENCE S. KRAIN, M.D.,
Plaintiff,

vs.

DEPARTMENT OF PROFESSIONAL REGULATION, et al., Defendant.

ORDER

This cause coming on for hearing on the Plaintiff's Complaint for Administrative Review, due and proper notice given to all parties, and the Court having considered the record, the briefs of the parties, and oral argument, the Court finds as follows:

1. The Court affirms the decision of the defendants on Count I, finding that the Directors's finding that Dr. Krain pled guilty to a felony is not against the manifest weight of the evidence;

2. The Court reverses the decision of the defendant on Count III, finding that the defendants' decision concerns

Dr. Krain having a mental disability is against the manifest weight of the evidence;

3. This cause is remanded to the Department for the sole and singular purpose of reevaluating its disciplinary sanctions in light of the Court's finding in this appeal;

4. It is further ordered that the previously stay order entered by this Court shall remain in effect on the same terms and conditions previously entered.

DATE: September 8, 1993

ENTER:

_____

Judge

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, Except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5/3-102. Scope of Article

§ 3-102. Scope of Article. Article III of this Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of Article III of this Act or its predecessor, the Administrative Review Act.[1] In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not hereafter be employed.

Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceedings before the administrative agency shall be barred from obtaining judicial review of such administrative decision. In an action to review any final decision of any administrative agency brought under Article III, if a judgment is reversed or entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the actin is dismissed by a United States District Court for lack of jurisdiction, neither the plaintiff nor his or her heirs, executors, or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater. All proceedings in the court for revision of such final decision shall terminate upon the date of the entry of any Order under either Section 2-1009 or Section 13-217. Such Order shall cause the final administrative decision of any administrative agency to

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[1] Ill.Rev.Stat. 1991, ch. 110, ¶ 264 et. seq. (repealed; see now 735 ILCS 5/3-101 et seq.)

become immediately enforceable. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protest, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

5/3-103. Commencement of action

§ 3-103. Commencement of action. Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency,but if no method is provided, a decision shall be deemed to have been served wither when personally delivered or when deposited in the United States mail, in a sealed envelope or package,with postage prepaid, addressed to the party affected thereby at his or her last known residence or place of business.

The form of the summons and the issuance of alias summons shall be according to the rules of the Supreme Court.

5/3-111. Powers of circuit court

§ 3-11. Powers of circuit court.

(a) The Circuit Court has power:

(1) with or without requiring bond (except if otherwise provided in the particular statute under authority of which the administrative decision was entered), and before or after answer filed, upon notice to the agency and good cause shown, to stay the decision of the administrative agency in whole or in part pending the final disposition of the case;

* * *

(7) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall be made on the ground of newly discovered evidence unless it appears to the satisfaction of the court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings; and that such evidence is material to the issues and is not cumulative.

5/2-1401. Relief from judgments

§2-1401. Relief from judgments.

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a

continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or

judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing rights to relief from a void order or judgment, or to employ any existing method to procure that relief.

Sixth Division
Filed 1/5/96

No. 1-93-4559

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAWRENCE S. KRAIN, M.D.	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
DEPARTMENT OF PROFESSIONAL REGULATION, STATE OF ILLINOIS; and NIKKI M. ZOLLAR, Director, Illinois Department of Professional Regulation,	)	No. 93 CH 3166
	)	
	)	
	)	
	)	
	)	Honorable Lester D. Foreman,
	)	Judge Presiding.
Defendant-Appellants.	)	

ORDER

The administrative review was brought by the plaintiff, Lawrence S. Krain, M.D., against the Illinois Department of Professional Regulation (the Department) and its Director to contest the minimum one year suspension of

the plaintiff's medical license and the Director's order that the plaintiff undergo psychiatric testing and evaluation. The Director acted pursuant to findings of fact and conclusions of law made by the Medical Disciplinary Board of the Department that: (1) the plaintiff had pled guilty to a felony charge of solicitation of subornation of perjury in California and that his license was thereby subject to discipline in Illinois, and (2) that the plaintiff suffered from a mental illness or disability which resulted in his inability to practice with reasonable skill and safety. (See 225 ILCS 60/21(A)(3), (A)(27) (West 1992).) The circuit court initially affirmed the Department's decision, but only on the grounds that the plaintiff's license had been subject to discipline in California. On a Motion for Reconsideration, however, the court determined that, because the plaintiff's record in California had been expunged, plaintiff's license was not subject to

discipline and reversed the Director's decision in toto. We now review the circuit court's order.

The record reveals that on May 30, 1990, the Department filed a one count complaint against the plaintiff alleging that he failed to disclose a felony conviction from California. The Department's complaint was amended to include, among other charges not relevant here, an allegation that the plaintiff suffered from a mental illness or disability which resulted in his inability to practice medicine with reasonable skill and safety. Both charges are grounds for discipline under the Medical Practices Act of 1987 (225 ILCS 232(A)(3, 22(A)(27) (West 1992)).

With regard to the first charge, plaintiff argued that he had not been convicted nor had he pled guilty to a felony in California, at least for purposes relating to his medical license in Illinois. Plaintiff relied upon the fact that his felony conviction in California had first been reduced to a

misdemeanor and then expunged. Plaintiff argued that the Full Faith and Credit Clause of the United State Constitution required Illinois authorities to give full recognition to the reduction and ultimate expungement.

With regard to the second charge, the claim by the Department that the plaintiff suffered from a mental illness or disability which resulted in his inability to practice medicine with reasonable skill and safety, the plaintiff argued simply that the evidence did not support the charge. It is on this second charge alone upon which we base our decision.

The record shows that at the hearing, the Department offered expert testimony that the plaintiff was unable to safely practice medicine and that he suffered from some form of psychosis. Dr. S. Dale Loomis, a psychiatrist, and Dr. Roger Thomson, a clinical psychologist, both testified plaintiff was suffering from a severe psychiatric disorder that prevented him from being able to practice medicine with

reasonable skill and safety. Although plaintiff objects to the use by the Department of Dr. Thomson's expert testimony because Dr. Thomson was not a medical doctor, Illinois reviewing courts have repeatedly held that it is permissible for psychologists to provide expert testimony about an individual's mental condition. Valiulis v. Scheffels (1989), 191 Ill.App.3d 775, 786, 547 N.E.2d 1289; People v. Robinson (1981), 102 Ill.App.3d 884, 892-93, 429 N.E.2d 1356; People v. Whitaker (1980), 87 Ill.App.3d 563, 567, 410 N.E.2d 166.

Dr. Thomson testified that plaintiff was a very intelligent man who was capable of good cognitive function in many situations, but that at times he could become psychotic and unable to make simple interpretations of reality. Dr. Thomson's opinion was supported by plaintiff's poor performance on psychological tests and plaintiff's

bizarre behavior during their session and in the waiting room.

According to Dr. Thomson, plaintiff asked at one point during his interview if Dr. Thomson was a twin. Plaintiff then stated he saw Dr. Thomson in a different light. Dr. Thomson testified that he observed plaintiff in his reception area accusing patients of being twins and triplets. Plaintiff also was overheard saying that people kept switching on him. He then approached each person in the waiting room, pointed, and said the word "switch." Finally, he approached a therapist and a patient and stated to each, "you've switched, you're a quintuplet."

Several months later, on June 12, 1991, Dr. Thomson happened to observe plaintiff on Washington Street in Chicago. On that date, Dr. Thomson was walking and saw plaintiff standing in front of a building at 55 East Washington. Plaintiff was gesturing to various people and

calling them quintuplets at this time. Dr. Thomson testified that plaintiff's behavior was consistent with psychosis rather than sanity.

Dr. Loomis, the psychiatrist, testified that he believed plaintiff was suffering from a major psychiatric disorder, and he expressed a concern that plaintiff might misidentify a patient and prescribe the wrong medication because of the misidentification. He felt that the disorder could be Capgrass syndrome, a condition characterized by a perception that there is another individual identical to the one who is actually present.

Plaintiff offered several expert opinions in his defense against the charges, including that of his personal psychiatrist, Dr. Jerome Katz. Dr. Katz had treated plaintiff since November 14, 1990. Although Dr. Katz indicated in his testimony that plaintiff was not physically disabled, Dr. Katz also admitted on cross-examination that he had not been

able to rule out psychosis as a diagnosis of the plaintiff. He also stated that he had regularly filled out insurance claim forms certifying that plaintiff was suffering from total disability based upon his mental condition. Dr. Katz testified that he had last done so within a month prior to his July 9, 1992 testimony. Notwithstanding his certification of disability on plaintiff's insurance forms, Dr. Katz testified that plaintiff could safely practice medicine. The hearing officer specifically found that Dr. Katz's testimony was contradictory in this regard.

Also included in the record in this case in a counterclaim filed by plaintiff against the Sentry Life Insurance Company. In the counterclaim, plaintiff alleged that the insurance company breached its "contract of long term disability insurance" by failing to pay him benefits. Plaintiff claimed benefits under the policy for the period between May 1,1989 and March 1, 1991.

In a proceeding for administrative review, it is not the proper function of a court to reweigh the evidence or make an independent assessment of the facts. (Abrahamson v. Illinois Department of Professional Regulation (1992), 153 Ill.2d 76, 88, 606 N.E.2d 1111.) Reviewing courts should not interfere with the agency's decision merely because the court may have come to a different conclusion. (Abrahamson, 153 Ill.2d at 88.) Instead, the agency's decision should be upheld unless it is against the manifest weight of the evidence. Murdy v. Edgar (1984), 103 Ill.2d 384, 391, 469 N.E.2d 1085.

In this case the Department concluded that plaintiff suffered from a mental illness or disability that resulted in his inability to practice medicine with a reasonable degree of safety and skill. (See 225 ILCS 60/227(A)(27) (West 1992).) Because the record contains substantial evidence that supports the Department's decision in this regard, the trial court erred

in reversing the Director's decision. Moreover, because we find the Department's disciplinary actions to have been appropriate on the charges relating to plaintiff's mental health alone, we decline to address the legal question of whether the reduction and then expungement of plaintiff's criminal record in California prevents the Director from using it as a basis for disciplinary action.

Accordingly, the judgment of the circuit court is reversed.

Reversed.

Zwick, P.J., with McNamara, J., and Egan, J., concurring.

Sixth Division
Filed 03/06/98

No. 1-96-2879

LAWRENCE S. KRAIN, M.D.	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, NIKKI M. ZOLLAR, Acting Director, Illinois Department Department of Professional Regulation.	)	
	)	Honorable
	)	Lester D. Foreman,
	)	
	)	Judge Presiding.

JUSTICE ZWICK delivered the opinion of the court:

Plaintiff, Dr. Lawrence S. Krain, appeals from an order of the circuit court in which the court determined that it had no jurisdiction to consider Dr. Krain's section 2-1401 petition for post-judgment relief. See 735 ILCS 5/2-1401 (West 1996). We affirm.

On January 5, 1996, in an unpublished order (No. 1-93-4559)(hereinafter, "Krain I"), this court reviewed an order

of the circuit court which reversed an order of the Department of Professional Regulation (the Department). We found, contrary to the findings of the circuit court, that the Department had relied upon substantial evidence in determining Dr. Krain suffered from a mental disease or disability which resulted in his inability to practice medicine with reasonable skill and safety. See 225 ILCS 60/21(A)(3), (A)(27)(West 1996). Accordingly, we reversed the circuit court and affirmed the Department's determination that Dr. Krain's license to practice medicine should be suspended for a minimum of one year.

In July of 1996, approximately six months after our decision in Krain I, plaintiff filed a second action for administrative review in the circuit court. Plaintiff cited the discovery of certain "new evidence" which he claimed

warranted new proceedings.[1] Dr. Krain relied upon section 3-111(a)(7) of the Administrative Review Law (735 ILCS 5/3-111(a)(7)(1996)) which grants the circuit court the power to remand issues to the agency upon the ground of "newly discovered evidence" as the jurisdictional basis for his petition. The circuit granted relief to Dr. Krain in the form of remand to the Department for reconsideration of the new evidence. The Department thereafter brought two interlocutory appeals of the circuit court's decision. We consolidated the Department's appeals and reversed the circuit court in a published opinion issued August 8, 1997, Department of Professional Regulation v. Krain, 291 Ill.

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[1] Specifically, Dr. Krain asserted that he had discovered that two of the drugs he had been prescribed by his doctors could interact to produce the physical symptoms relied upon by the Department in concluding that Dr. Krain suffered from a mental disease or disability. He asserted that if he had been able to present this evidence at his hearing, the Department would not have revoked his license to practice medicine.

App. 3d 988, 684 N.D.2d 826 (1997) (hereinafter, "Krain II"). In that opinion, we held that section 3-111(a)(7) of the Administrative Review Law does not confer jurisdiction on the circuit court to reconsider administrative review proceedings once they have been concluded.

At the time we considered the Department's appeals in Krain II, we were aware, through references in the record, that Dr. Krain had asserted a section 2-1401 claim in the circuit court, in addition to relying upon section 3-111(a)(7) of the Administrative Review Law as a basis of circuit court jurisdiction. We were also aware that the circuit court determined that it was without jurisdiction to consider the section 2-1401 petition. We were unaware at the time of considering Krain II, however, that Dr. Krain had filed a timely notice of appeal from the circuit court's section 2-1401 ruling. Neither the Department nor Dr. Krain sought to consolidate that appeal with the present case. Thus, in this

appeal, we address the undecided question of whether the circuit court had jurisdiction to consider Dr. Krain's new evidence claims pursuant to section 2-1401.

Section 2-1401 of the Code of Civil Procedure provides a mechanism whereby final judgments, decrees, and orders may be vacated more that 30 days after their entry. Although a section 2-1401 petition arises out of the same proceedings in which the order or judgement that it is directed to was entered, it is a collateral attack on the judgment. Ptaszek v. Michalik, 238 Ill. App. 3d 72, 76, 606 N.E.2d 115 (1992); City of Des Plaines v. Scientific Machinery Movers, Inc., 9 Ill. App. 3d 438, 442, 292 N.E.2d 154 (1972). In order to be granted relief under section 2-1401, the petitioner must show by a preponderance of the evidence (1) a meritorious defense or claim in the original action; (2) due diligence in pursuing the defense or claim in the trial court; and (3) due diligence in presenting

the section 2-1401 petition. Smith v. Airoom, Inc., 114 Ill. 2d 209, 499 N.E.2d 1381, (1986).

Dr. Krain argues that section 2-1401 of the Code of Civil Procedure is available not only to a litigant who seeks review in the circuit court of a final judgment initially rendered by that court, but also, of decisions made by the circuit court on administrative review. He cites for support the appellate court's decision in Rizzo v. Board of Fire and Police Commissioners, 11 Ill. App. 3d 460, 297 N.E.2d 247 (1973), a case which is procedurally similar. In Rizzo, the court affirmed the decision of the circuit court granting post-judgment relief under section 72 of the Civil Practice Act, the precursor to section 2-1401, to an employee of the Chicago Police Department who wished to show that perjured testimony had been the basis of the administrative agency's decision against her, a decision made some three years before her petition was filed and which had been affirmed on appeal

in Rizzo v. Board of Fire and Police Commissioners, 131 Ill. App. 229, 267 N.E.2d 7 (1971).

Dr. Krian's reliance on section 2-1401 is misplaced because when the General Assembly's adopted the Administrative Review Law it rendered that statute the exclusive method of challenging decisions issued by the Department. 735 ILCS 5/3-102 (West 1996). The courts are expressly precluded from granting any other statutory, equitable, or common law mode of review. Smith v. Department of Public Aid, 67 Ill. 2d 529, 367 N.E.2d 1286 (1977)(construing precursor to Administrative Review Law, the Administrative Review Act). Thus, the Illinois decisions are clear that alternative methods of direct review or collateral attach of an agency decision such as that envisioned by 2-1401 are simply not available. Cf. Weissinger v. Edgar, 180 Ill. App. 3d 806, 810, 536 N.E.2d 237 (1989);

Board of Education v. Eckmann, 103 Ill. App. 3d 1127, 1129-30, 432 N.E.2d 298 (1982).

Since the Administrative Review Law provides the exclusive means by which Dr. Krain can seek review of the Department's determination, and because that statute does not provide for the type of post-judgment relief provided by 2-1401, the circuit court was correct in holding that it lacked jurisdiction over Dr. Krian's section 2-1401 claims. To the extent that this court's 1973 decision in Rizzo is inconsistent with this holding and implies that section 2-1401 review is available to a litigant following the conclusion of administrative review proceedings, we respectfully decline to follow it.

Dr. Krain argues that it is simply inequitable for there to be no means by which he can now raise the existence of newly discovered evidence so as to restore his professional reputation. All litigation, however, must come to an end as

some point in time. As the Department points out, Dr. Krain retains the option of repetitioning the Department for reinstatement of his medical license under section 43 of the Medical Practices Act. 225 ILCS 60/43 (West, 1996). This section provides that the Department may restore or reinstate a license upon the recommendation of the Medical Disciplinary Board. Under this procedure the Board may consider subsequent information regarding the applicant's treatment which, in this case, would include any information regarding how the discontinuance of the prescription drugs Dr. Krain was taking at the time he manifested signs of mental disability have affected his current mental condition. If such evidence were to indicate that Dr. Krain had been misdiagnosed by the Department's experts, that fact could be considered in deciding whether to reinstate his license. Although such a remedy is not perfect in that it is not the same as vacating the original decision of the Department, it

is the only remedy consistent with the provision of the Administrate Review Law.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.
GREIMAN, P.J., AND QUINN, J., concur.

Sixth Division
Filed 04-10-98

No. 1-96-2879

LAWRENCE S. KRAIN, M.D.	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, NIKKI M. ZOLLAR, Acting Director, Illinois Department of Professional Regulation.	)	No. 93 CH 3166
	)	
	)	Honorable Lester D. Foreman, Judge Presiding.
Defendants-Appellees.	)	

MODIFIED ORDER UPON DENIAL OR REHEARING

JUSTICE ZWICK delivered the opinion of the court:

Plaintiff, Dr. Lawrence S. Krain, appeals from an order of the circuit court in which the court determined that it had no jurisdiction to consider Dr. Krain's section 2-1401 petition for post-judgment relief. See 735 ILCS 5/2-1401 (West 1996). We affirm.

On January 5, 1996, in an unpublished order (No. 1-93-4559)(hereinafter, "Krain I"), this court reviewed an order of the circuit court which reversed an order of the Department of Professional Regulation (the Department). We found, contrary to the findings of the circuit court, that the Department had relied upon substantial evidence in determining Dr. Krain suffered from a mental disease or disability which resulted in his inability to practice medicine with reasonable skill and safety. See 225 ILCS 60/21(A)(3), (A)(27)(West 1996). Accordingly, we reversed the circuit court and affirmed the Department's determination that Dr. Krain's license to practice medicine should be suspended for a minimum of one year.

In July of 1996, approximately six months after our decision in Krain I, plaintiff filed a second action for administrative review in the circuit court. Plaintiff cited the discovery of certain "new evidence" which he claimed

warranted new proceedings.[1] Dr. Krain relied upon section 3-111(a)(7) of the Administrative Review Law (735 ILCS 5/3-111(a)(7)(1996)) which grants the circuit court the power to remand issues to the agency upon the ground of "newly discovered evidence" as the jurisdictional basis for his petition. The circuit granted relief to Dr. Krain in the form of remand to the Department for reconsideration of the new evidence. The Department thereafter brought two interlocutory appeals of the circuit court's decision. We consolidated the Department's appeals and reversed the

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[1] Specifically, Dr. Krain asserted that he had discovered that two of the drugs he had been prescribed by his doctors could interact to produce the physical symptoms relied upon by the Department in concluding that Dr. Krain suffered from a mental disease or disability. He also alleged that at the time of the hearing he had been suffering from an undiagnosed neurological disorder, tic douloureux, which was subsequently corrected though surgery. He asserted that if he had been able to present this evidence at his hearing, the Department would not have revoked his license to practice medicine. He also requested that the circuit court consider the ultimate outcome of litigation with his insurance company in a dispute over disability benefits.

circuit court in a published opinion issued August 8, 1997, Krain v. Department of Professional Regulation 291 Ill. App. 3d 988, 684 N.D.2d 826 (1997) (hereinafter, "Krain II"). In that opinion, we held that section 3-111(a)(7) of the Administrative Review Law does not confer jurisdiction on the circuit court to reconsider administrative review proceedings once they have been concluded.

At the time we considered the Department's appeals in Krain II, we were aware, through references in the record, that Dr. Krain had asserted a section 2-1401 claim in the circuit court, in addition to relying upon section 3-111(a)(7) of the Administrative Review Law as a basis of circuit court jurisdiction. We were also aware that the circuit court determined that it was without jurisdiction to consider the section 2-1401 petition. Although Dr. Krain's brief indicated that an appeal of the section 2-1401 denial had been filed, neither the Department nor Dr. Krain sought to consolidate

that appeal with the present case. Thus, in this appeal, we decide the question of whether the mechanisms provided by section 2-1401 of the Code of Civil Procedure apply to final administrative decisions. We hold they do not.

Section 2-1401 of the Code of Civil Procedure provides a mechanism whereby final judgments, decrees, and orders may be vacated more that 30 days after their entry. Although a section 2-1401 petition arises out of the same proceedings in which the order or judgement that it is directed to was entered, it is a collateral attach on the judgment. Ptaszek v. Michalik, 238 Ill. App. 3d 72, 76, 606 N.E.2d 115 (1992); City of Des Plaines v. Scientific Machinery Movers, Inc., 9 Ill. App. 3d 438, 442, 292 N.E.2d 154 (1972). In order to be granted relief under section 2-1401, the petitioner must show by a preponderance of the evidence (1) a meritorious defense or claim in the original action; (2) due diligence in pursuing the defense or

claim in the trial court; and (3) due diligence in presenting the section 2-1401 petition. Smith v. Airoom, Inc., 114 Ill. 2d 209, 499 N.E.2d 1381, (1986).

Dr. Krain argues that section 2-1401 of the Code of Civil Procedure is available not only to a litigant who seeks review in the circuit court of a final judgment initially rendered by that court, but also, of decisions made by the circuit court on administrative review. He cites for support the appellate court's decision in Rizzo v. Board of Fire and Police Commissioners, 11 Ill. App. 3d 460, 297 N.E.2d 247 (1973), a case which is procedurally similar. In Rizzo, the court affirmed the decision of the circuit court granting post-judgment relief under section 72 of the Civil Practice Act, the precursor to section 2-1401, to an employee of the Chicago Police Department who wished to show that perjured testimony had been the basis of the administrative agency's decision against her, a decision made some three years before

her petition was filed and which had been affirmed on appeal in Rizzo v. Board of Fire and Police Commissioners, 131 Ill. App. 229, 267 N.E.2d 7 (1971).

Dr. Krain's reliance on section 2-1401 is misplaced because when the General Assembly's adopted the Administrative Review Law it rendered that statute the exclusive method of challenging decisions issued by the Department. 735 ILCS 5/3-102 (West 1996). The courts are expressly precluded from granting any other statutory, equitable, or common law mode of review. Smith v. Department of Public Aid, 67 Ill. 2d 529, 367 N.E.2d 1286 (1977)(construing precursor to Administrative Review Law, the Administrative Review Act). Thus, the Illinois decisions are clear that alternative methods of direct review or collateral attach of an agency decision such as that envisioned by 2-1401 are simply not available. Cf. Weissinger v. Edgar, 180 Ill. App. 3d 806, 810, 536 N.E.2d 237 (1989);

Board of Education v. Eckmann, 103 Ill. App. 3d 1127, 1129-30, 432 N.E.2d 298 (1982).

Since the Administrative Review Law provides the exclusive means by which Dr. Krain can seek review of the Department's determination, and because that statute does not provide for the type of post-judgment relief provided by 2-1401, the circuit court was correct in holding that it lacked jurisdiction over Dr. Krain's section 2-1401 claims. To the extent that this court's 1973 decision in Rizzo is inconsistent with this holding and implies that section 2-1401 review is available to a litigant following the conclusion of administrative review proceedings, we respectfully decline to follow it.

Dr. Krain argues that it is simply inequitable for there to be no means by which he can now raise the existence of newly discovered evidence so as to restore his professional reputation. All litigation, however, must come to an end as

some point in time. As the Department points out, Dr. Krain retains the option of repetitioning the Department for reinstatement of his medical license under section 43 of the Medical Practices Act. 225 ILCS 60/43 (West, 1996). This section provides that the Department may restore or reinstate a license upon the recommendation of the Medical Disciplinary Board. Under this procedure the Board may consider subsequent information regarding the applicant's treatment which, in the case, would include any information regarding how the discontinuance of the prescription drugs Dr. Krain was taking at the time he manifested signs of mental disability and his surgery to correct tic douloureux have affected his current mental condition. If such evidence were to indicate that Dr. Krain had been misdiagnosed by the Department's experts, that fact could be considered in deciding whether to reinstate his license. Although such a remedy is not perfect in that it is not the same as vacating the

original decision of the Department, it is the only remedy consistent with the provision of the Administrate Review Law.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

GREIMAN, P.J., AND QUINN, J., concur.

SUPREME COURT OF ILLINOIS
Supreme Court Building
Springfield 62706

JULEANN HORNYAK
Clerk of the Court
(217) 782-2035

TELECOMMUNICATIONS
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(312) 793-1333

THE COURT THIS DAY HAS ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 84337 - Lawrence S. Krain, M.D., petitioner, v. Department of Professional Regulation, etc., et al., respondents.

Motion by petitioner to recall and stay the mandate pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court. Motion allowed.

JH/jat
cc: Mr. John P. Schmidt

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-LAW DIVISION

LAWRENCE S. KRAIN, M.D.,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	96 CH 6929
	)	
DEPARTMENT OF PROFESSIONAL REGULATION, STATE OF ILLINOIS, NIKKI M. ZOLLAR, Acting Director, Illinois Department of Professional Regulation,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the about-entitled cause, before the Honorable ELLIS REID, Judge of said court, on the 19th day of July 1996.

APPEARANCES: MR. WILLIAM J. HARTE and MISS JOAN MANNIX, on behalf of Plaintiff;

MR. PAUL CIASTKO, on behalf of Defendants.

Jo Raines
Official Court Reporter
Circuit Court of Cook County
County Department-Chancery Division

THE CLERK: Krain versus Department of Professional Regulations.

THE COURT: Lady and gentlemen, you put in the mortgage foreclosure book. It's not a mortgage foreclosure, but I will hear you right now.

What happened with respect to the other outstanding matter, why I put it over to today from the 17th to give my fellow Judge an opportunity to see what he would do.

MR. HARTE: William Harte together with Joan Mannix for the plaintiff, your Honor.

MR. CIASTKO: Paul Ciastko on behalf of defendants, Department of Professional Regulation and the director.

MISS MANNIX: Joan Mannix with Mr. Harte.

MR. HARTE: We presented the petition, the 2-1401 petition to Judge Foreman. We argued the issue. The Department filed a response in that case.

Judge Foreman, as we went along with the argument, finally determined that he had no jurisdiction to hear the case because he claimed that the case before him terminated with the adjudication in the Appellate Court and leave to appeal the Supreme Court having been denied.

What I sought to assert to him was that notwithstanding the fact that there was a remand that indeed the Appellate Court had entered an order adjudicating the case as it presently constituted and then the mandate issued. The case was before him for any other proceedings that might be appropriate. And I filed a 2-1401.

He, I believe, in fairness to him, entered a determination that indeed the Appellate Court had entered an order in the case which was adverse to my client.

He initially had rejected the determination by the Department that the facts warranted that he could no longer practice medicine for a period of one year, or there abouts.

I attempted to persuade him that under 2-1401 it addresses this issue. And he said that, well it doesn't address any issue before me because I held with you.

When I informed him that there had been a case filed before you and that we had been before you the day before he entered an order, I believe, determining that he had no jurisdiction and that we were to come before you. And here we are.

That doesn't mean I have given up before Judge Foreman because it appears to me on further reflection and research that we had filed a motion for reconsideration. But as the record stands the case before you is viable because it's a separately filed action.

THE COURT: How do I get, Mr. Harte, jurisdiction in rem in this matter that arose as administrative review of a particularized decision. And that has now been dealt with both at the trial level and at the appellate level?

MR. HARTE: What I am seeking here is injunctive relief because I assert in our complaint that the case that was made before the Department was made on an erroneous conclusion of facts which did not reveal themselves until the case was before Judge Foreman.

THE COURT: That was argued before Judge Foreman see that merges into the decision that went upstairs. And at that point before he entered a final and appealable order he had the opportunity to remand the matter to the agency. And he chose not to do that and he entered a final and appealable order which was in fact appealed.

MR. HARTE: Yes, your Honor. He reversed the Department's determination.

THE COURT: That's right. I understand that. And then he was reversed.

MR. HARTE: He was reversed by the Appellate Court. But in the interim--

THE COURT: Are you saying this is newly discovered evidence. Had you brought that to his attention under the 2-1401 in the nature of a writ of error forum novo so to speak?

MR. HARTE: Yes.

THE COURT: And he felt he had no jurisdiction.

MR. HARTE: He said he had no jurisdiction.

THE COURT: Well, I can't argue that and I cannot respond to that. That is his right to make that ruling. I just feel, as I told you when you were before me on the 17th, I feel uncomfortable with respect to the rem jurisdiction. I just do not seek, and you would have to show me a case, the Supreme Court of Illinois or the First District Court of Appeals that would not continence me taking in rem jurisdiction in a circumstance such as this, because this is basically a collateral attack, in my opinion.

MR. HARTE: You Honor, In Russell versus Kline, 46 Il. Ap. 3d.

THE COURT: Is that in your stack?

MR. HARTE: It's in the papers of the Department. The issue was raised on what happens at the time the Appellate Court enters a judgment without remand. And what happened in that case--

THE COURT: Tell me, it's in the response of the Department? I have the stack.

MR. HARTE: It's cited.

THE COURT: But the case is not here.

MR. HARTE: I have the case. In that action when the mandate returned to the Circuit Court a separate petition was filed on a new matter.

And the court in Russell v. Kline held that what happens when the case is in the Appellate Court and it's returned to the Circuit Court and a new petition is filed that

new petition, your Honor, is an action that must be dealt with. And it either can be dealt in the case which was filed and was addressed on appeal or it can be a new action. The court in that case said that there is some question about that. But because the issue was not addressed there was a waiver.

And what I have done I had done both.

THE COURT: Okay, well they make a reference to Rule 369(b) which might not still be the rule today, that's a '77 case. Let me just look at the rules.

Okay, Rule 369 is filing of mandate in Circuit Court and proceedings thereafter:

(a) File a mandate. The Clerk of the Circuit Court shall file a mandate promptly upon receiving it.

(b) Dismissal of Affirmance. When the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the Circuit Court, enforcement of the

judgment may be had and other proceedings may be conducted as if no appeal had been taken.

(c) Remandment. When the reviewing court remands the case for a new trial or hearing and the mandate is filed in the circuit court, the case shall be reinstated therein upon 10 days notice to the adverse party.

Now that doesn't implicate anything about another subsequent or--see, we don't have a subsequent order. That's my problem. I would like for you, if you can, address that in the context of this case. Would we not be addressing the order of the Department that was originally appealed from?

MR. HARTE: Yes, your Honor. The Russell versus Kline case says, when a new petition is filed, or when there is a new matter that is to be presented to the court regarding the case, at the time the mandate is sought to be enforced. And that is why they're seeking to enforce the mandate. And

that is that the judgment of the Board is discipline of one year is to be effectuated. In Russell v. Kline it says you address it either in the original action or when new matter is being asserted you file a new petition, a new action.

I sought to persuade Judge Foreman that because the mandate is before him and they would seek to effectuate the decision of the Board, and that is the only way the Department can do that, that the case is before him and I was filing a 2-1401, which is a separate independent petition. It's a separate action in itself.

He said he had no jurisdiction and I was to see you. I am here now. I am seeing you. I'm giving you the case. Now I don't care, it's either you or Judge Foreman, but someone, somehow, somewhere, sometime has to address the issue.

What I seek to do is have this man's rights adjudicated, not on a restoration before the Department, but

on the initial finding with respect to his inability and incompetency to practice medicine. And I say to you that in our papers we establish the fact that there is a new, totally new, undiscovered basis upon which--

THE COURT: Do you have, according to the rules of the Department, the ability to file a motion in the nature of a petition for a rehearing at this stage, according to the rules?

MR. HARTE: What they say is I must proceed on a restoration. And what I say is that I can proceed for a reconsideration on the factual basis of the initial decision.

THE COURT: Okay, let me hear from the department.

MR. CIASTKO: Your Honor, we believe neither court has jurisdiction. There has been one administrative review, that's over now. We're not seeking to enforce the

mandate from the appellate Court. We're seeking to enforce DPR's order suspending the doctor from practice.

We have a motion to dismiss which we filed today which addresses the subject matter of jurisdiction of this court. What they're trying to do is file a second administrative review.

The order entered in this case was entered March of 1993. Now, three years later they want to file a second administrative review of something that's already been reviewed by Foreman. As opposing counsel stated the appellate Court reversed the Circuit Court on the mandate issue. There is nothing additional before this court.

The proper proceeding for the plaintiff in this case would be to proceed before DPR, go through the restoration process, make a written application to the Disciplinary Board. They would review the case. They would provide their decision to the director. He would either agree with

them and issue a license if they should so find. If not, they can deny it and at that time he can seek another administrative review of a final order.

MR. HARTE: What I assert is that in the interim the man is not practicing medicine, although we assert that the initial decision was wrong. We are not seeking here to restore his license because we can make application before the Department on a restoration.

But what we're seeking to do is to address the initial decision. So what I'm saying is if we follow that procedure the man is destroyed. His reputation is destroyed. His certification to the various boards are withdrawn. All of that happens and that's irreparable injury to him, which is not cognizable at law.

THE COURT: The only problem I have with your position is that the appellate process didn't happen instantaneously in that the ruling was made by the Appellate

Court and then the petition for leave to appeal was filed with the Supreme Court.

From the papers that I have gleaned on the 17th it appeared that the argument that you are making to this court was made to the Supreme Court of Illinois.

MR. HARTE: No.

THE COURT: In some fashion.

MR. HARTE: No it was not. Because when the notice of appeal was filed by the Department from Judge Foreman's order the man was practicing and he had won the case.

THE COURT: I understand that. So there was nothing to stay.

MR. HARTE: There was nothing that could be done at the Appellate Court--

THE COURT: But did you ask for a stay as a part of your petition to appeal to the Supreme Court? That's what

I'm asking. Was there a petition for a stay? Because what you had when the Appellate Court reversed Judge Foreman then you had something that from your position implicated the necessity for a stay. Am I correct?

MR. HARTE: Correct.

THE COURT: Did you then appeal to the Supreme Court as part of your papers and file a petition for leave to stay?

MR. HARTE: I filed a petition--

THE COURT: Petition for a stay with your leave to appeal?

MR. HARTE: I filed a petition for leave to appeal. And what I assert is that although we presented an argument to the Supreme Court that indeed there had been a change in circumstances the Supreme Court denied the petition for leave to appeal.

I do not know why it was done.

THE COURT: I can't speculate either.

MR. HARTE: Except that once the notice to appeal is filed then there has to be an evidentry hearing on this 1401. Once the notice of appeal is filed from the original action the Trial Court has no jurisdiction to hear what I'm talking about. It is only when the mandate returns under the rule as indicated in Russell versus Kline that the court can entertain the new petition consistent with the rule as if no appeal had been taken.

THE COURT: I understand that clearly if it is not inconsistent with the mandate. The judge has to follow the mandate. But if it is something that is in addition and is not inconsistent with the mandate then perhaps the court has jurisdiction to do that. That's Judge Foreman's case and I am not going to comment on that.

But this is my case and it seems to me to be a collateral attack on really the case that's before Judge Foreman.

MR. HARTE: Russell versus Kline says that--that's the Appellate Court-- that you do it one or the other way. In that case it says you file a new action ion the court when they seek to effectuate the mandate. What I'm seeking to do is to stay the enforcement of the mandate. So instead of the restoration procedure we address the initial decision.

THE COURT: Well, this is a matter of some significance. That is why I've spent as much time as I have on it.

MR. HARTE: In the Supreme Court we did not assert this request for relief. We did state that the Prosac reaction, the bases for the Prosac reaction, we asserted was the reasons for the initial decision had then discovered in the interim.

THE COURT: When was that discovered, Mr. Harte?

MR. HARTE: 1994 I think or was '5.

THE COURT: After the record was made that you had appealed from.

MR. HARTE: Oh, yes.

THE COURT: Well, gentlemen, they have a motion to dismiss. Let me read it carefully.

MR. HARTE: Their motion to dismiss suggests that I am trying to appeal from the initial case and I had to do it within 35 days. I did it immediately, in fact even before the case was remanded here for execution on the mandate. The 35 day rule just isn't applicable, because indeed the appeal on this was made within 35 days. In fact the man had won his case before Judge Foreman.

THE COURT: Well, the dilemma here is that you don't have a record to stand on for review by any court at this point based on your newly discovered evidence.

MR. HARTE: Judge, respectfully the man has a grievance. They haven't even addressed his grievance. He has a claim. He has a complaint. There is no place now, unless you accept subject matter jurisdiction, where that claim can be redressed.

MR. CIASTKO: There is, your Honor. He can proceed before DPR in the restoration process.

The COURT: I'm trying to figure out how he can get before DPR at this point and present this newly discovered evidence, without a remand order from the Circuit Court.

That's why I asked you are there any rules other than the ingame rule that would allow him now, like you know we have a 1401 petition, could he not go before them on something in the nature of a 1401 petition and say there is

newly discovered evidence about this prosac problem. And you should hear it and make it part of your record. And let them make a decision in their wisdom. Everybody really should defer to the Department. If the Department changes its mind then we don't have a problem.

MR. CIASTKO: That's what they can do at the restoration process.

THE COURT: Mr. Harte is saying in equity here when you balance the harms, you have a man who is highly skilled, highly trained and a member of a lot of boards with reciprocal agreements, and States with reciprocal agreements. Once this becomes final he loses all of that. And then if you try and restore him, you know, Humpty Dumpty fell off the wall is really what Mr. Harte is saying and I find very compelling.

If the Department is going to change its mind, change its' mind now and not after they issue the final order which will destroy his reputation.

MR. CIASTKO: Your Honor, he has had an opportunity. He filed the administrative review. He won at that level.; It was reversed by the Appellate Court. That's the end of that.

THE COURT: I'm very sympathetic to that portion of your argument.

MR. HARTE: But not on the facts as stated in our petition, not on those facts. Those have not been addressed.

THE COURT: Just as a matter of equity and without regard to anything because the Department can't tell me that there is a remedy, a remedy an adequate remedy available to him, I have just got to take jurisdiction, remand it to the Department and enter a stay order subject to the remandment. And then you can appeal from that. It's a

final and appealable order. You can take it up right now. But right now there is a stay order in effect. I'm going to remand it and let the Department deal with it.

MR. CIASTKO: Just for the record we request a stay pending appeal.

THE COURT: I'm entering a remandment order and a stay pending the remandment. That's all I have and I'm taking jurisdiction of. What I'm saying to you is I consider that a final and appealable order. I'll put in 304(a) language for you so you can immediately appeal but the stay will be in effect in my order until such time as you do a remandment and then issue me a final administrative order based on the remandment of this file on his petition based on this newly discovered evidence.

That's my ruling and like I say if you want put 304(a) language in it, if you can.

MR. CIASTKO: Yes, we would, your Honor.

THE COURT: Okay.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS,
COUNTY DEPARTMENT-CHANCERY DIVISION

I, Josephine Raines, an Official Court Reporter for the Circuit Court of Cook County, County Department-Chancery Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable ELLIS REID, Judge of said court.

_____

Official Court Reporter
License No. 084-001740

dated this 23rd day
of July 1996

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS,
COUNTY DEPARTMENT-CHANCERY DIVISION

I, the Honorable ELLIS REID, Judge of the Circuit Court of Cook County, presiding judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise fully appear of record, the attorney for the_____ tenders this Report of Proceedings and prays that the same may be signed and sealed by the judge of this court pursuant to the statutes in such case made and provided.

_____
HONORABLE ELLIS REID
Circuit Court of Cook
County, Illinois